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IN THE

Supreme Court of the United States

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October Term, 1972

No. 72-194

LANDIS TOOL COMPANY, DIVISION OF LITTON INDUSTRIES,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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LANDIS TOOL COMPANY, DIVISION OF LITTON INDUSTRIES,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioner, Landis Tool Company, Division of Litton Industries, petitions for a writ of certiorari to review a portion of the judgment of the United States Court of Appeals for the Third Circuit, entered on June 15, 1972, insofar as it enforces an order of the National Labor Relations Board holding an unlawful promise of benefits is implied when a company representative solicits employee grievances or states his opinion a union is not necessary because they can solve the problems between them without a third party.

Opinion Below.

The opinion of the Court of Appeals is not yet officially reported, but appears herein as Appendix B (page 2). The decision and order of the Board are reported at 190 N.L.R.B. No. 140 and appear

herein as Appendix C (page 9). The decision of the Trial Examiner appears herein as Appendix D page 13).

Jurisdiction.

The judgment of the Court of Appeals was entered on June 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented.

1. Does an employer violate Section 8(a)(1) of the National Labor Relations Act when its representative solicits employee grievances or states his opinion a union is unnecessary because they can solve the problems between them without a third party?

2. Where language in a Trial Examiner's Decision, adopted by the Board in its Decision and Order, is crucial to the holding of the case, can appellate counsel for the Board substitute his opinion for that of the Board by conceding that the language is dictum only?

Statutes Involved.

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. Sections 151, *et seq.*, are set forth in Appendix E. (page 48).

Statement of the Case.

Landis Tool Company is engaged in the manufacture and sale of cylindrical grinding machines at its principal plant in Waynesboro, Pennsylvania. On May 7, 1970, the National Labor Relations Board conducted a union representation election among the Landis employees. The union, Local 110, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, lost the election by a count of 432 to 252.

The union filed unfair labor practice charges against Landis, as well as objections to conduct affecting the results of the election. After an investigation, the Board's Regional Director issued a complaint against Landis and directed a hearing on the objections be consolidated with the hearing on the complaint.

All of the objections to the election were either withdrawn by the union or overruled by the Trial Examiner, who nevertheless recommended setting aside the election based upon his findings under the complaint allegations. The complaint, insofar as it is pertinent here, alleged that Ralph Price, president of Landis, had "interrogated (Landis) employees concerning their gripes and complaints."

The evidence adduced in support of this allegation showed that Price held a series of group meetings with employees before the election. Testimony revealed that at one of the meetings, Price told the employees he wanted to hear their gripes and complaints, that he could do nothing because his hands were tied until the election was over, that he could promise them nothing, and that he did not think a union was needed to straighten out their problems because the employees and company could have worked them out together.

At another meeting he told the employees he wanted to hear their complaints, that there was not much he could do at the moment under the circumstances, but he would do what he could do, and that he did not think the employees needed a union to straighten out their problems because the company and the men could do it among themselves. At still another meeting, he told the employees he wanted to hear their gripes, that he

could promise them nothing, but would check into them, and that he did not think the employees needed a union because the company and the employees could settle their own problems.

In his decision, the Trial Examiner made no finding of illegal interrogation, but stated:

> The complaint allegation in this case is cast in terms of interrogation, which in a sense is an accurate description of Price's conduct, but the illegality of Price's conduct lies in the fact that the solicitation of grievances, in a preelection context, carries with it the implied promise that the grievance will be remedied. (Footnote omitted.) Price said he could make no promises and no express promises were made. It was not necessary for Price to make express promises. A promise is patently implied when an employer tells employees they do not need a union to straighten out their problems.

The Board adopted the decision of the Trial Examiner in a pro forma decision, as follows:

> The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner. (Footnote omitted.)

On oral argument before the Court of Appeals, appellate counsel for the Board argued the above quoted language of the Trial Examiner was dictum only. In its decision, the Court of Appeals enforced the Board's decision and order, as follows:

> The examiner concluded that in a preelection context it was not necessary for Price to make ex-

> press promises; a promise was implied when he told them they did not need a union to straighten out their problems. The conclusion that implied promises were made in a preelection context is supported by substantial evidence.

With respect to the above quoted language of the Trial Examiner, the Court of Appeals stated:

> Counsel for the Board in oral argument conceded that the quoted language is dictum only. To the extent that it suggests a per se rule that any solicitation of grievances in a preelection context will always be held to imply unlawful promises we expressly disapprove it. (Citations omitted.)

REASONS FOR GRANTING THE WRIT.

1. The opinion and judgment of the Court of Appeals is in conflict with opinions of other courts of appeal. Stripped of its niceties, the decision holds an employer representative may not lawfully call its employees together and solicit their complaints, nor may he tell them they do not need a union to solve their problems because the company and employees can work them out together, even when the employer expressly states he can make no promises. That is precisely what the Board held, and that is the import of the decision of the Court of Appeals.

That decision is in conflict with the decision in *Fairchild Camera and Instrument Corporation v. National Labor Relations Board,* 404 F. 2d 581, Eighth Circuit, 1968. In that case, pending a runoff election, the employer held meetings with groups of employees for the specific purpose of soliciting their grievances. According to one witness, wages were discussed, and the company representative stated a wage survey had been or was being conducted, but he could make no announcement at that time as to its outcome. Another witness testified that sick leave was discussed, and the company representative said it was being contemplated, and he was mildly surprised at how well it had worked out with an office group of employees. A third witness testified the company representative stated "we would try to straighten . . . out" any trouble employees were having, and that the posting of a seniority list was requested and later was posted: With very little discussion, the court declined to enforce the Board's order finding Farichild had violated Section 8(a)(1) of the Act.

The decision of the Court of Appeals in this case is in conflict with the decision in *National Labor Relations Board v. M. H. Brown Company, Inc.*, 441 F. 2d 839, Second Circuit, 1971. In that case, the union sent a telegram to the president of the company, advising him of the union's organizational drive at the plant. The company president immediately called three successive groups of employees into his office, told them he was surprised to hear of the union campaign, and asked them what their complaints and problems were. Almost all raised complaints about wages, and he replied he was going to give them raises as he had previously mentioned to several of them. He suggested a wage and benefit package was being prepared for them, but stated he did not know if he could put it into effect because of the union's appearance. The Trial Examiner and Board found the president had violated Section 8(a)(1) of the Act, but the Court, treating the case as one involving interrogation, refused to enforce the Board's order.

2. The decision of the Court of Appeals involves an important First Amendment right of Free Speech and is in conflict with an applicable decision of the Supreme Court. In *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 62, the Court set forth language which the company submits is applicable here:

> We acknowledge that the enactment of §8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. (Footnote omitted.) And, as we stated in another context, cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should

be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.' (Citations omitted.)

While the *Linn* case admittedly took place in a different context than here, the above quoted language has been applied by courts of appeal to cases where an employer's utterances have been held by the Board to be in violation of Section 8(a)(1). Three such cases denying enforcement of Board orders are *National Labor Relations Board v. TRW-Semiconductors,* 385 F. 2d 753, Ninth Circuit, 1967; *Automation & Measurement Division, The Bendix Corporation v. National Labor Relations Board,* 400 F. 2d 141, Sixth Circuit, 1968; and *National Labor Relations Board v. Sanitary Laundry, Inc.,* 441 F. 2d 1368, Tenth Circuit, 1971.

The Supreme Court chooses its words carefully; and when it spoke of a "profound commitment," presumably it meant a very deep and intense commitment, not a half-hearted one; and when it spoke of "uninhibited, robust and wide-open debate, presumably it meant the parties should be free to debate free from inhibition, vigorously, and to the fullest extent.

3. In *Excelsior Underwear, Inc.,* 156 N.L.R.B. 1236, the Board adopted a rule requiring employers who were parties to election proceedings to supply it with a list of the names and addresses of the eligible voters, which the Board then turned over to the union. In part, it justified this requirement with the argument it was necessary for both sides of the union issue to be presented to the voters. In *National Labor Relations Board v. Wyman-Gordon Company,* 394 U.S. 759,

767, the Supreme Court sustained the Board's position, commenting that "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives . . . by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses." Yet under the opinion of the Board and Court of Appeals in this case, an employer is prohibited from meeting with the voters to ascertain what the issues are, or from expressing the opinion they do not need a union to resolve those issues.

Section 8(c) of the Act provides "The expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." Price made no threat of reprisal or force, nor did he expressly promise a benefit. The Company submits he could not impliedly promise a benefit when he expressly stated to the employees he could promise nothing.

This Court has never decided a Section 8(c) case involving an *implied* promise of benefits. Indeed, there appears to be only one case enforced by a court of appeals where an implied promise of benefits was discussed, and in that case, the implied promises were so thinly veiled, they were ludicrous. *National Labor Relations Board v. Flomatic Corporation*, 347 F. 2d 74, Second Circuit, 1965.

Management's right to speak and the role of Section 8(c) regarding so-called implied promises involve important questions which have not been, but should be, decided by this Court.

4. The Trial Examiner's Decision, as adopted by the Board, clearly sets forth a *per se* rule "that the solicitation of grievances, in a preelection context, carries with it the implied promise that the grievance will be remedied . . . (and) a promise is patently implied when an employer tells employees they do not need a union to straighten out their problems."

The Company submits that language was crucial to the Board's decision and order, and Board's appellate counsel on oral argument had no authority to concede such language was not the basis for the Board's decision. Parties to Board litigation are entitled to know what the Board says; and when it speaks, appellate counsel has no authority to water down or change its decisions. Certainly, in decisions which the Board will render subsequent to this case, it can rely on its decision in this case as written, and will not be bound by what its appellate counsel says the decision means. See *Reliance Electric Company*, 191 N.L.R.B. No. 1, and *Flight Safety, Inc.*, 197 N.L.R.B. No. 40. As this Court stated in *National Labor Relations Board v. Metropolitan Life Insurance Company*, 380 U.S. 438, 1144, "the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action.'"

5. In its opinion, the Court of Appeals quotes certain testimony, but adds emphasis to parts of the testimony, but no such emphasis was added by Price when he spoke the words. This results in a distortion of what really happened during the Price meetings. And while the opinion also refers to the testimony of employee Mellot as being in "like vein" as the quoted testimony, it ignores the fact Mellot also testified that Price more than once told the employees he could not promise

them anything, and he was not promising them anything. Similarly, the opinion makes no reference to the testimony of another witness, employee Fair, who testified that Price said at least twice he could make no promises, and he made no promises. These omissions result in a further distortion of the Price meetings; for while artificial emphasis is applied to certain testimony, other testimony in favor of the Company is overlooked.

Conclusion.

Under present Board law, a union is free to contact employees (even in their homes) and may ask them what their job-related complaints are. It can disparage their employer and promise to improve wages and benefits if selected as their bargaining representatives. If an election is ordered, the employer is required to supply a list of the names and addresses of the employees for the use of the union in carrying on these activities.

On the other hand, it is unlawful for an employer representative to call on employees in their homes to solicit their support in an election campaign. Under the Board's decision in this case, as unaltered by appellate counsel, the employer may not even lawfully ask the employees what their complaints are, for, the Board says, such questions imply a promise to remedy those complaints. Further, under the Board's unaltered holding in this case, the employer representative may not even tell his employees it is his opinion the employees do not need a union because he believes the company and the employees can work out their problems together, for that, says the Board, implies a promise.

And all of this in the face of a Constitutional Amendment guaranteeing Free Speech, a statutory pro-

vision in aid of that amendment and a profound commitment to uninhibited, robust and wideopen debate in union representation elections.

Questionable Board decisions such as this, together with others sought and obtained by unions, have in the past ten years resulted in an unprecedented concentration of power in unions. While the national policy under succeeding administrations has been to combat inflation, artificial wage increases rooted in this power, rather than productivity, have contributed to the inflationary rise, not to mention the exodus of American jobs to Mexico, Europe and the Orient. This case affords an opportunity to take a step toward a more equitable balance between the union and employer forces in our economy.

The petition should be granted.

Dated: July 31, 1972.

M. J. DIEDERICH,
LOUIS A. CAPPADONA,
Attorneys for Petitioner,

APPENDIX A.

Judgment.

United States Court of Appeals, for the Third Circuit.

Landis Tool Company Division of Litton Industries, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1549.

Before: HASTIE and GIBBONS, Circuit Judges, and BECKER, District Judge.

THIS CAUSE came on to be heard upon a petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated June 8, 1971, against Landis Tool Company, Division of Litton Industries, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on April 7, 1972, and has considered the briefs and transcript of record filed in this cause. On May 22, 1972, the Court being fully advised in the premises, handed down its opinion denying the petition to review and granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Landis Tool Company, Division of Litton Industries, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioner.

BY THE COURT
John J. Gibbons
Circuit Judge

DATED: June 15, 1972.

APPENDIX B.

Opinion of the Court.

United States Court of Appeals for the Third Circuit.

Landis Tool Company, Division of Litton Industries, *Petitioner, v.* National Labor Relations Board, *Respondent.* No. 71-1549.

On Petition For Review and Cross-Application For Enforcement of an Order Of the National Labor Relations Board.

Argued April 7, 1972.

Before Hastie and Gibbons, *Circuit Judges,* and Becker, *District Judge.*

(Filed May 22, 1972)

Gibbons, *Circuit Judge.*

This case is before us on the petition of Landis Tool Company, Division of Litton Industries, to review and set aside an order issued against it by the National Labor Relations Board, and on the cross-application of the Board for enforcement of the order. The case arises out of a representation election held among Landis employees on May 7, 1970, which the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110, lost by a vote of 432 to 252. Thereupon the Union filed objections to the conduct of the election and an unfair labor practice charge against Landis. After the Board's Regional Director concluded his investigation of the Union's unfair labor practice charge the General Counsel issued a complaint. The hearing on the objections to the conduct of the election was consolidated with that on the unfair labor practice complaint. All of the objections to the election were either withdrawn

by the Union or overruled by the Trial Examiner. The Trial Examiner did, however, find that Landis had engaged in some of the unfair labor practices charged, while dismissing allegations of others. Landis, the Union and the General Counsel each filed exceptions to the Trial Examiner's decision. The Board overruled all exceptions, adopted the Trial Examiner's findings and conclusions, and ordered that the results of the May 7, 1970 election be set aside and a rerun election held. It entered a cease and desist order with respect to the unfair labor practices found by the Trial Examiner, and ordered the posting for 60 days of the usual form notice.

Landis' petition for review presents the issue whether substantial evidence on the record as a whole supports the conclusion of the Board that it interfered with, restrained and coerced its employees, in violation of §8(a)(1) of the Act. 29 U.S.C. §158(a)(1).

I. Solicitation of Grievances and Implied Promises to Correct Them

The Trial Examiner found that Landis' President, Ralph E. Price, at meetings of employees shortly before the election, solicited employee grievances and impliedly promised that the grievances would be remedied if the Union was defeated. The grievance solicitation meetings were not a part of any regular grievance solicitation program. There is evidence in the record which supports the Trial Examiner's conclusion that there were implied promises. For example, employee Monn testified:

"Q. I'll ask you again if you can relate to the best of your recollection the substance of what was discussed at these meetings?

A. I don't know if it was the first one or not—I believe it was all he said to us was he felt—he told us that there was enough guys signed union cards to get a vote; that he couldn't promise anything; that his hands was tied; he couldn't tell us the date of the election because it wasn't set yet. And then there was another one—he took us all up—and he wanted to know what our complaints and gripes were. He still stated that he couldn't do anything because his hands was still tied—*until the election was over;* that he couldn't promise us anything.

The guys told him about what their complaints were about; and he said that he didn't feel that that was a need for a union because he thought—that he really didn't realize that the complaints were getting that bad; and he felt that the employees there in the company could of taken this all out—*could of worked this all out—between them—without a third party.*" (131a) (emphasis supplied).

There was testimony in like vein by employees Hoffman (125a) and Mellott (140a). The examiner concluded that in a preelection context it was not necessary for Price to make express promises; a promise was implied when he told them they did not need a union to straighten out their problems. The conclusion that implied promises were made in a preelection context is supported by substantial evidence. The testimony suggests that the employees understood their grievances would be remedied if the Union was defeated. Such conduct was an interference with rights of employees guaranteed by Section 7 of the Act, 29 U.S.C. § 157,

and Landis thereby violated Section 8(a)(1), 29 U.S.C. §158(a)(1).

In his discussion of Price's implied promises the Trial Examiner states:

> "The complaint allegation in this case is cast in terms of interrogation, which in a sense is an accurate description of Price's conduct, but the illegality of Price's conduct lies in the fact that the solicitation of grievances, in a preelection context, carries with it the implied promise that the grievance will be remedied." (14-15a).

Counsel for the Board in oral argument conceded that the quoted language is a dictum only. To the extent that it suggests a per se rule that any solicitation of grievances in a preelection context will always be held to imply unlawful promises we expressly disapprove it. *See Fairchild Camera and Instrument Corp. v. NLRB*, 404 F.2d 581, 583-85 (8th Cir. 1968); *ITT Telecommunications*, 183 NLRB No. 115, 74 LRRM 1386, 1387 (1970). There is substantial evidence to support the Trial Examiner's finding that implied promises were made, and that finding does not depend upon the operation of a per se rule.

II. Interrogation and Threats

The Trial Examiner found that prior to the election Olen Stoops, welding department assistant foreman, interrogated employee Monn why he wanted a Union, after having informed Monn that Price had instructed all supervisors to ask employees such a question. This finding and his further conclusion that the interrogation was part of Landis' campaign against the Union, are supported by substantial evidence. He also found that Colin Beegle, welding department foreman,

prior to the election asked employee Monn why he wanted the Union, related to Monn that in 1946 a previous president of Landis made the statement that he would shut the gates before he let a union in, and expressed to Monn that President Price would follow in the same footsteps. These findings are supported by substantial evidence. He also found that welding department foreman Washabaugh prior to the election interrogated employee Fair and threatened employees Fair, Fann, Miller and Ray that Landis would close its doors if the Union came in. These findings are supported by substantial evidence.

III. Surveillance

The Trial Examiner found that Ralph Verdier, production manager, created the impression, in an interrogation of employee Earl Baer prior to the election, that Landis had his union activities under surveillance. He also found that welding department foreman Washabaugh prior to the election told employees Ray and Fann that he knew they had signed union cards and that employee Miller was a union-instigator, thereby creating the impression that Landis had employees' union activities under surveillance. Again credibility issues were resolved against the Landis witnesses. There is substantial evidence to support these findings.

With respect to the foregoing instances of threats, interrogation and suggestions of surveillance, the testimony of the Landis witnesses was sharply at variances with that of the employee witnesses. Landis would have us disregard the Trial Examiner's factual findings because there was testimony that it had held cautionary meetings to instruct its supervisors as to proper compliance with the National Labor Relations Act. But the

Trial Examiner made credibility judgments which we cannot on this record go behind. *See, e.g., NLRB v. Wings & Wheels, Inc.*, 324 F.2d 495, 496 (3d Cir. 1963); *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 171 (3d Cir. 1962).

Landis also contends that the instances of threats, interrogation and surveillance, involving only six out of 800 employees are too marginal, minimal and isolated to justify the entry of the Board's order setting aside the election. But the incidents in question were found to be a part of a systematic program. Moreover they cannot be insulated from the meetings conducted by President Price at which implied promises were found to have been made. The Board's inference that the conduct found to have taken place was in fact coercive is a reasonable one, and we cannot substitute our own inference even if on this record we might have a different one. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Finally Landis contends that assuming the Board's findings of unfair labor practices must be sustained its order was improper because of the minimal, marginal and isolated nature of the violations. But the Board points out that the interrogations and threats which were found to have taken place were concentrated in the night shift of the welding department, one of the centers of the Union's organizing efforts, and were directed to some employees having an important role in the Union's campaign. We cannot substitute our judgment for that of the Board that in the circumstances a new election was called for. The cease and desist order certainly was limited to the unfair labor practices found to have occurred. It was certainly authorized by §10(c) of the Act, 29 U.S.C. §160(c), and

may indeed have been mandatory. *See Eichleay Corp. v. NLRB*, 206 F.2d 799, 805 (3d Cir. 1953). The notice which the Board ordered posted was also limited to the unfair labor practices found to have occurred, and was not, as Landis suggests, unduly punitive. *Compare NLRB v. Douglas & Lomason Co.*, 443 F.2d 291, 295 (8th Cir. 1971).

The petition to review the Board's order will be denied. The Board's order will be enforced in full.

A True Copy:
Teste:

APPENDIX C.

Decision, Order, and Direction of Second Election.

United States of America, Before the National Labor Relations Board.

Landis Tool Company, Division of Litton Industries and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110. Cases 6—CA—5021, 6—RC—5191.

On February 22, 1971, Trial Examiner Henry J. Jalette issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. In addition, the Trial Examiner found an interference with the election held in Case 6—RC—5191 and recommended that the election be set aside. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs and the Respondent filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no preju-

dicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, Landis Tool Company, Division of Litton Industries, Waynesboro, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

IT IS FURTHER ORDERED that the election conducted on May 7, 1970, in Case 6—RC—5191 be, and it hereby is, set aside and that Case 6—RC—5191 be, and it hereby is, remanded to the Regional Director for Region 6 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director for Region 6 deems

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[1]In view of the Trial Examiner's findings and recommendations which are adopted herein, Member Brown finds it unnecessary to decide whether Respondent's campaign literature also violated the Act and interfered with the election.

appropriate, The Regional Director shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[2] Those eligible

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[2]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 6, within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall

(This footnote is continued on next page)

shall vote whether or not they desire to be represented for collective-bargaining purposes by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110.

Dated, Washington, D.C. June 8, 1971.

Edward B. Miller, Chairman
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

[Seal]

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make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

APPENDIX D.

TRIAL EXAMINER'S DECISION.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Washington, D. C.

Landis Tool Company, Division of Litton Industries and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110. Case No. 6-CA-5021, 6-RC-5191.

Peter B. Hoffman, Esq., of Pittsburgh, Pa., for the General Counsel.

Ben J. Diederich, Esq. and *Louis A. Cappadonas, Esq.*, of Beverly Hills, Calif., for the Respondent.

Thomas Moser, of Washington, D. C., and *Harold Kaminsky, Esq.*, of Johnston, Pa., for the Union.

Statement of the Case

Henry L. Jalette, Trial Examiner: These cases involve allegations of independent 8(a)(1) conduct and the alleged discriminatory discharge of two employees in a complaint issued on July 29, 1970,[1] pursuant to an unfair labor practice charge filed on May 14, by the above-captioned Union, and objections to conduct affecting the results of an election which had been conducted on May 7, pursuant to a petition filed by the Union on January 20, and a Decision and Direction of election issued on April 3. The tally of ballots indicated that of approximately 751 eligible voters 252 had cast votes for the Union and 432 had cast votes against union representation. On May 13, the Union filed timely objections to conduct affecting the results of the

[1]Unless otherwise indicated, all dates hereinafter refer to 1970.

election and on July 31, the Regional Director for Region 6 issued a Supplemental Decision in which he directed a hearing on the objections. On July 31, the Regional Director issued an order consolidating Case No. 6-CA-5021 and Case No. 6-RC-5191. The cases were tried in Waynesboro, Pennsylvania, on October 27, 28 and 29.

Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by General Counsel, the Union, and the Respondent, I make the following:[2]

Findings of Fact

I. The Business of the Respondent

Respondent is a Pennsylvania corporation with its principal office and manufacturing facility located in Waynesboro, Pennsylvania, where it is engaged in the manufacture, sale and service of machine tools and related products. During the 12-month period immediately preceding issuance of the complaint. Respondent purchased and received at its Waynesboro plant directly from points outside the Commonwealth of Pennsylvania goods and materials valued in excess of $50,000. During the same 12-month period, Respondent shipped goods valued in excess of $50,000 from its Waynesboro plant directly to points outside the Commonwealth of Pennsylvania.

II. The Labor Organization

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union

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[2]Counsel for the General Counsel filed a motion to correct the record. After due consideration, I conclude that the motion is well made and it is hereby granted. The motion to correct the transcript is hereby made part of the record as Trial Examiner's Exhibit 1.

No. 110, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Independent 8(a)(1) Conduct*

1. The interrogation of employees About their gripes and complaints by Respondent's President Ralph E. Price.

It is undisputed that prior to the election on May 7, Respondent's President, Ralph E. Price, conducted three meetings of employees. The exact dates of these meetings were not established (it is clear one meeting was held May 6), nor is it clear at which of the meetings the alleged unlawful remarks were made. The dates are not important; the remarks were made after the filing of the petition in Case No. 6-RC-5191 and before the election, and within the 10(b) period.

Several employees[3] testified that at one of the meetings Price initiated a question and answer session stating that he wanted to know the employees' gripes and complaints. He told the employees he could make no promises, but he stated in the course of the meeting that he did not think the employees needed the Union to straighten out whatever problems existed, that they could do it among themselves, the company and the employees. David Fair testified that in stating that he wanted to know about their gripes and complaints, Price stated that he wanted to know why the fellows would want the Union.

Price did not testify, nevertheless Respondent contends that Fair cannot be credited as to that portion of

[3]David Fair, Earl Baer, Ronald Mellott, William Monn, and Charles Bieseacker.

his testimony attributing to Price the remark that he wanted to know why the employees would want the Union. Moreover, Respondent contends that "solicitation of employee grievances by an employer is not illegal unless accompanied by an express or implied promise of benefits specifically aimed at interfering with, restraining, and coercing employees in their organizational efforts." *ITT, Telecommunications,* 183 NLRB No. 115, slip opinion, page 3.

Respondent's first contention is predicated on the fact that of the employees who testified about the meetings with Price only Fair attributed to him the remark that he wanted to know why the employees would want the Union and that Fair did not include that remark in his pretrial statement. Despite this, and although the finding of a violation does not turn on whether or not Price made that or a similar statement, I am disposed to accept Fair's testimony. It is abundantly clear from the testimony of all the employees that the purpose of the meeting, whether or not it was so stated, was to find out why the employees had sought out a union to represent them. Meetings such as Price held were not regular meetings but were held solely because of the Union's organizational campaign and the employees had every reason to understand this because it is undisputed that Price did tell them they did not need a union, that they could solve their problems by themselves.

As to Respondent's second contention, I conclude that its reliance on *ITT, Telecommunications,* is misplaced. That case is entirely different on its facts. The gravamen of the complaint in that case was that the employer had unlawfully interrogated its employees. The complaint allegation in this case is cast in terms of interrogation, which in a sense is an accurate de-

scription of Price's conduct, but the illegality of Price's conduct lies in the fact that the solicitation of grievances, in a preelection context, carries with it the implied promise that the grievance will be remedied.[4] Price said he could make no promises and no express promises were made. It was not necessary for Price to make express promises. A promise is patently implied when an employer tells employees they do not need a union to straighten out their problems. The record supports only one conclusion: that the purpose of Respondent in soliciting employee grievances was to undermine the Union. In the circumstances, such conduct constituted interference with the right of employees guaranteed by Section 7 of the Act and Respondent thereby violated Section 8(a)(1) of the Act. *Texaco, Inc.*, 178 NLRB No. 72; *Eagle-Picher Industries, Inc.*, 171 NLRB No. 44.

2. The alleged threat by Roy Potts

Lee Miller, alleged discriminatee, testified that on an unspecified date after his layoff, while at the used car lot of one Obie Jones, he overheard a conversation between Jones and Foreman Roy Potts in which Jones asked Potts how many employees had been laid off at Respondent's plant. Potts replied 26 or 27 and Jones asked him if there would be more and Potts replied that Respondent planned to lay off about 90 more employees. Jones asked if there was a lack of work or "does it have something to do with the union business?" Potts said, "Well, the work isn't as good as it could be and the Union could have something to do with it."

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[4]As a matter of fact, one complaint about the absence of a cutting torch (perhaps a small matter, but nonetheless serious enough to one employee to be voiced) was immediately remedied.

General Counsel contends that the remarks of Potts constituted a threat of loss of employment because of the implication that the union activities of the employees were the cause of the layoffs. In my view, the evidence does not support such a finding. In the first place, at the time Potts made the remark attributed to him by Miller, he was not an agent of Respondent. He was merely a supervisor of Respondent engaged in a personal transaction. In my opinion, a violation of the Act cannot be predicated on statements of a supervisor in a private conversation not intended to be heard or communicated to employees.[5] Secondly, Miller's own version of the conversation indicates not a threat but the personal conjecture of a low ranking supervisor who was not privy to Respondent's decision making process insofar as the size of its working force was concerned.[6]

For the foregoing reasons, I shall recommend that paragraph 6(g) of the complaint be dismissed.

3. The alleged threat by W. Elliot Angle

According to employee Arlen Reed, on an occasion in May, 1970, he was on a chore with his supervisor Ed Washabaugh and superintendent Elliott Angle, and Washabaugh and Angle were talking and Angle remarked to Washabaugh, "We could use two more men." He said, "We would hire two or call back two except-

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[5]This is not to say that such a statement may not constitute evidentiary support of an employer's motive for a layoff.

[6]According to Potts, Jones suggested that the layoffs were occasioned by the union activities at the plant and Potts said, "Well I wouldn't want to quote on that." This is not too different from ". . . the Union could have something to do with it." Potts impressed me as a credible witness, but admitted to such a faulty memory that I accept Miller's version of the conversation, but find no violation.

ing that the Labor Board has (what did he call it?) involved with the union now and they have pressed charges against us."

Both Angle and Washabaugh denied that Angle made any such statement. I was very favorably impressed by Angle's demeanor and although he was night superintendent, I cannot believe that he was privy to Respondent's councils to have made a statement such as that attributed to him by Reed. Since I credit Angle, perforce I credit Washabaugh.

Since I find that Angle did not make the statement attributed to him by Reed, I shall recommend that paragraph 6(f) of the complaint, as amended, be dismissed.

4. The allegations concerning Olen Stoops

Employee William Monn testified that on an occasion in early 1970 before the March 20 layoffs, he asked assistant foreman Olen Stoops about a meeting of supervisors they had just attended. Stoops told him that Price had told the supervisors to ask each of the employees under his supervision why each one wanted the union in the shop. Stoops asked Monn his reason and Monn replied for better benefits, better retirement, and seniority.

Stoops admitted that Monn asked him about the supervisors' meeting but he denied the remainder of Monn's testimony. Respondent contends I should not credit Monn, because he did not include this conversation with Stoops in the prehearing statement, and because it is incredible that a supervisor could make such a statement as Monn described when he was "just returning from a supervisors' meeting where he is told by the Company's attorney he should not interrogate employees about the Union. . . ."

As to the first point, I am not persuaded in this instance that it is sufficient reason to discredit Monn. As to the second point, the record does not bear out Respondent's assertion that Stoops was returning from a meeting where company attorneys advised them not to interrogate employees. There were such meetings, but there were also other meetings of supervisors not attended by company attorneys at which Price spoke. This was admitted by foreman Washabaugh who testified, they were to get ". . . across to the people that we have problems and that those problems will try to be resolved as quickly as possible." Washabaugh's testimony further indicates that Price wanted to learn from his supervisors what problems the employees had. Under the circumstances, including the fact that Respondent's own president violated the Act, I can attach no significance to the instructions given by counsel to the supervisors.

In the case of Stoops, I was not particula ly impressed by his demeanor on the witness stand and I cannot help but note that apart from denying the statements attributed to him by Monn he said almost nothing. Thus, after admitting that Monn asked him about the supervisors meeting, he testified he replied "It's about the election—the union campaign." He did not explain what was said at the meeting about the election and when asked if there was anything else, he replied, "Well not that I remember—I mean, he would ask me questions and I would answer them, but nothing important." Stoops was unduly reticent. I do not credit him. Monn appeared to me to be a truthful witness testifying to the best of his recollection. I credit him.

Respondent contends that even if Stoops did ask Monn why he wanted the Union, such a "casual ques-

tion" in non-coercive circumstances does not violate the Act. However, the statement made by Stoops before his questioning of Monn was that Price had instructed all supervisors to ask employees such a question. This is not casual conduct. It is systematic. It has no lawful purpose. It was part of Respondent's campaign, as exemplified by president Price's own statements in the employee meetings, to impress on employees that the Union was not necessary to redress their grievances. Under all the circumstances, I find the interrogation of Stoops as alleged in paragraph 6(c) of the complaint, as amended, was coercive and violative of Section 8(a)(1) of the Act.

5. The allegations concerning Colin Beegle

Employee William Monn also testified that shortly after his conversation with assistant foreman Stoops described above, Foreman Colin Beegle asked him why he wanted a union and Monn told him the same thing he had told Stoops. Beegle told Monn that back in 1946 one Hollengren, then president of Landis Tool, had made the statement that he would shut the gates before he'd let a union come in, and he (Beegle) said he felt that current president Price would follow in the same footsteps and that he would close the gates because he had other plants. Beegle said Price would not negotiate and this would cause a strike which Monn could not afford.

Beegle denied any conversation with Monn about the Union. To prove that he could not have referred to Hollengren, he pointed out that he was in high school in 1946 at the time Hollengren was president. For this reason, Respondent contends I should not credit Monn. In addition, because the interrogation Monn ascribed

to assistant foreman Stoops above occurred in Beegle's presence, Respondent says there was no need for Beegle to ask the same question. An additional defense is the one I have already rejected relative to the instructions to Respondent's supervisors by its attorneys.

Despite these contentions, I do not credit Beegle whose demeanor did not impress me favorably, whereas, as I have previously indicated, Monn appeared to me to be a truthful witness. The fact that Beegle was not working at the plant when Hollengren was president does not negate his having been told of Hollengren's views by others who had been working there in 1946. Monn was likewise not employed at the plant in 1946, yet he heard about Hollengren. He likewise could have heard about him from others, but he claims he heard about him from Beegle.

As to the contention that Beegle would not have asked Monn why he wanted the Union because Stoops had allegedly asked him the same question earlier in Beegle's presence, I am not persuaded from a review of the testimony that Beegle was present when Stoops interrogated Monn. Rather, it appears that Beegle at most overheard Monn ask Stopps what had happened at the supervisor's meeting and then he walked away.

In accordance with the foregoing I find that on an occasion before the election, Respondent, by its supervisor and agent, Colin Beegle, interrogated an employee about his union sentiments and threatened plant closure if the employees selected the Union as their bargaining representative. By such conduct, Respondent violated Section 8(a)(1) of the Act.

6. The conduct of Ralph Verdier

The complaint, as amended, alleges that Ralph Verdier, production manager, created the impression that Respondent was engaged in the surveillance of the employees' union activities and that he interrogated employees about their union activities.

Employee Earl Baer testified that in the latter part of April, Verdier asked him "How are you and the Union getting along?" Baer replied, "No better than anyone else, I suppose" and Verdier rejoined that he had heard Baer was a pretty strong union man. Verdier remarked how he thought Baer had been well treated by Landis, and Baer expressed his complaint about his hourly rate of pay considering his years of service and productivity. Verdier adverted to a more senior employee and told Baer he was in line for his job. A few days later, Verdier asked Baer if he had changed his mind about how he was going to vote and Baer replied he might not vote at all. Verdier told him the company wanted him to vote, one way or the other.

Verdier admitted speaking to Baer, as to all employees under his supervision, to tell him of the election and that he expected Baer to vote. When Baer told him he might not vote, Verdier told him he should vote regardelss of how he voted. Verdier denied asking Baer how he and the Union were getting along or remarking he had heard Baer was a strong union man or asking Baer if he had changed his mind.

Apart from its reliance on Verdier's denial, Respondent contends that the statements attributed to him by Baer, if Baer is credited, are not violative of the Act.

I do not credit Verdier. I cannot believe that Verdier's conversations with Baer were as innocuous as he

suggested. For example, he testified he knew Baer was a union man because Baer volunteered the information. According to Verdier, this came about because Baer asked him not to talk to him within his work area because after he'd leave Baer would be kidded by other employees in the area. Then, after he had testified that Baer volunteered the information he was a union man, Verdier testified, "He didn't say if he was supporting the union or not. He just asked me not to talk to him anymore." This contradictory testimony, as well as the revelation that Verdier talked to Baer frequently enough about the Union to be asked by Baer not to do so, lead me to believe that Baer, who appeared to be a truthful witness, should be credited.

Contrary to Respondent's contention, I find that Verdier's statements to Baer were violative of the Act. They were clearly interrogatory, served no lawful purpose, were part of a pattern of interrogation, and occurred in the context of other unfair labor practices. The effects of the interrogation are seen in Baer's remark during the second interrogation that he might not vote at all. Baer had quickly perceived that Verdier's questioning was not a mere casual interest about the forthcoming election. In like manner, the remark that he had heard Baer was a pretty strong union man cannot help but have caused Baer to believe that his union activities were being surveyed by Verdier. In my judgment, Verdier's conduct was clearly coercive and tended to restrain Baer from the exercise of his Section 7 rights. I find, therefore, that Respondent, by Verdier's conduct violated Section 8(a)(1) of the Act as alleged in paragraph 6(b) and (c) of the complaint, as amended.

7. The conduct of Eugene George

Alleged discriminatee Lee Miller testified that he had heard that foreman Ed Washabaugh was telling employees that Miller was a union instigator and he asked foreman Eugene George if Washabaugh had said anything to him and George told him that Washabugh had told him the same thing.

General Counsel contends that by so reporting to Miller, George created the impression that Respondent was engaged in surveillance of employees' union activities.

Apart from other considerations[7] I do not believe that under the circumstances depicted by Miller a violation of the Act can be predicated on George's response to Miller's question. It is the General Counsel's position that Miller was an outstanding supporter of the Union and Miller admitted to having engaged in union activities on company time and property. On his own testimony, he had heard that Washabaugh was referring to him with other employees as a union instigator. If anything created the impression of surveillance, it was Washabaugh's remarks (a matter independently alleged to be violative of the Act), not George's reply to Miller's question. To the extent paragraph 1(b) of the complaint, as amended, relies on this incident I shall recommend that it be dismissed.

8. The conduct of Edward Washabaugh

Foreman Washabaugh is alleged to have created the impression of surveillance of employees' union activities and to have threatened employees with layoff and

[7]Foreman Washabaugh denied telling George that Miller was a union instigator, and George did not testify.

cessation of Respondent's operations if they selected the Union as their bargaining representative.

Alleged discriminatee Robert Ray testified that either in January or February 1970, Foreman Ed Washabaugh told him and fellow employee Jim Fann that he knew they had signed union cards. He said he was opposed to the Union and that "before the Landis Tool Company would let the union come in, they's close the doors."

Either on this or some other occasion, Washabaugh told Ray and Fann that if the Union got in, there wouldn't be enough work back there for the two of them (Ray and Fann did grind and dress work in the welding department) and one of them would have to go. He made a similar remark about the two inspectors in the department.

On one occasion, Wasabaugh remarked to Ray and Fann that Lee Miller, an alleged discriminatee, was the union instigator.

Fann substantially corroborated Ray's testimony.

Employee David Fair testified that on March 24, Washabaugh asked him why he wanted the Union and Fair told him it was for better benefits.

On one occasion, Washabaugh told Fair and Miller that Price would close the doors to the plant before he'd let the Union in. Miller confirmed that Washabaugh made such a statement, although he described it as a statement to Fair which he overheard.

Washabaugh denied the allegations made by Ray, Fann, Fair and Miller. He admitted talking to some employees about the Union, including Fann, Miller, and Fair, but not Ray.

Where allegations of independent 8(a)(1) statements are concerned, deciding on the credibility of witnesses is a particularly vexing problem, generally because there are no extrinsic factors to rely upon, but only the impression one forms from his observation of the witnesses. On this basis, I credit Fair's testimony that he was interrogated by Washabaugh, and his and Miller's testimony that Washabaugh threatened plant closure before Respondent would let the Union come in. I also credit Fann's and Ray's testimony that Washabaugh told them he knew they had signed cards, that Miller was the Union instigator, and that Respondent would close its doors before letting the Union come in. The impression I formed of Washabaugh leads me to believe he would make such statements, not because he was told this by Price, but because he believed this himself and felt that he could tell the employees this without violating Respondent's instructions. However, I cannot see any basis for the statements attributed to him by Ray and Fann about the need for only one inspector and one grind and dress man if the Union came in, and I do not credit Ray and Fann with regard to such testimony. Ray did not attribute such a statement to Washabaugh in his prehearing affidavit and I suspect a belated recollection of a statement which conveniently supports the allegations of the discriminatory layoff of Ray and Miller.

By telling Ray and Fann he knew they had signed union cards and that Miller was the union instigator, Washabaugh created the impression that Respondent was keeping the employees' union activities under surveillance. Such conduct tends to restrain employees in the exercise of their rights under Section 7 of the Act and is violative of Section 8(a)(1) of the Act. Sim-

ilarly, the threats of plant closure and the interrogation of Fair about his reasons for wanting the Union (interrogation which is found to be clearly coercive in the context of the case and Washabaugh's other conduct) constituted conduct violative of Section 8(a)(1) of the Act.

B. *Respondent's Campaign Literature*

General Counsel contends that Respondent violated Section 8(a)(1) of the Act by its preelection campaign literature. He contends that in an April 30 letter to all employees Respondent threatened them with the loss of existing benefits unless they refrained from supporting the Union. This contention is based on the following excerpts from that letter:

> "Bargaining could begin from "zero" and during the course of good faith negotiations, existing wage rates and benefits could be retained, improved or *eliminated.*" (Emphasis supplied.)
>
> * * *
>
> "I believe it is good sense not to risk trading away the things you have and the things that can be achieved by cooperative discussion between you and the company, for all the uncertainties this union stands for."

In my judgment, it may not be fairly held that the quoted passages constituted threats (thinly veiled or explicit) of loss of existing benefits. In *Bray Oil Company,* 169 NLRB No. 150, in a letter developing the same theme as here developed, the employer stated "The Company could and would start bargaining from scratch." The letter was found not to contain any threat of reprisal. In *Wagner Industrial Products Company, Inc.,* 170 NLRB No. 157, the Board stated the

following about a more explicitly worded letter: "Further, a reading of the letter as a whole shows that the main thrust of Respondent's argument is that the mere designation of a union will not automatically secure to employees a large *increase* in wages and benefits. There is no specific implication that Respondent intended to adopt a bargaining posture offering the employees less than they were then receiving." I conclude that the same statement can be made about Respondent's April 30 letter, and I shall recommend that the allegation of paragraph 6(h) of the complaint, as amended, be dismissed.

Between January 22 and May 7, Respondent distributed at least 13 pieces of literature to its employees, and General Counsel contends that by the repeated references therein to strikes Respondent conveyed to employees the impression that strikes were inevitable, and Respondent thereby threatened employees with loss of employment if they selected the Union as their bargaining representative.

As an example of the tenor and tone of Respondent's remarks concerning the possibility of strikes and violence, General Counsel adverts to the following from a May 1 letter:

> But there is no way of getting around the fact that to have a union strike you first get a union and that a union strike is one of the hazards you undertake by bringing in a union. It is also no coincidence that many of the strikes you read about are called by the Teamsters.
>
> After all, a strike is the union's *ultimate* weapon —the *only* way it can hope to force your company to give all of the things promised by the union

organizers when they were trying to win your support. When these demands are unreasonable, the likelihood the union will have to use that weapon *increases.*

* * *

During such a strike, you cannot collect *unemployment* insurance benefits. You simply are ineligible for them as long as you voluntarily refuse to work over contract demands. Unfortunately, as day after day passes, and the weeks and perhaps months drag on, your weekly and monthly bills just keep coming in. Grocery and clothing bills, telephone and utility bills, house and car payments, and all the rest, still have to be paid—and few creditors will stand idly by and let payments be missed, especially during a long strike.

* * *

That's not even the worst of it. First you have to survive two trips a day through a *Teamster picket line*—and even Teamster members from other plants can be recruited to picket. Hundreds of pickets, milling around your car, blocking it as you try to drive in and out of work, kicking it or hitting it with picket signs, and shouting obscene and offensive names at you, would make it pretty difficult to try to come to work. And then they start the anonymous, threatening telephone calls to you and your family in the middle of the night.

In support of his position, General Counsel cites three cases: *Brandenburg Telephone Company,* 164 NLRB 825; *Kawneer Co.,* 164 NLRB 983; and *Boaz Spinning Company,* 177 NLRB No. 103. Respondent contends that its literature was protected by Section 8(c)

of the Act and counters General Counsel's citations by citations of its own; e.g., *Ripley Shoe Products Company,* 171 NLRB No. 153; *Texaco, Inc.,* 178 NLRB No. 72; *Howmet Corporation,* 171 NLRB No. 18; *Bray Oil Company,* 196 NLRB No. 150; *Allied/Egry Business Systems, Inc.,* 169 NLRB No. 60.

The Union, relying not only on campaign literature introduced into evidence by General Counsel, but also on literature it introduced into evidence in support of its objection No. 7, asserts that the election should be set aside and it submits its own list of citations; e.g., *Marsh Super-Markets,* 140 NLRB No. 83; *Aeronca Manufacturing Company,* 160 NLRB No. 35; *Lincoln Manufacturing Company,* 160 NLRB No. 146; *General Industries Electronics Company,* 146 NLRB 1139; *Kawneer Company,* 169 NLRB No. 138.

I have carefully considered all the cases cited by the parties, as well as others disclosed by my own research, and I conclude that Respondent's campaign literature did not exceed the boundaries of permissible propaganda. The Board decisions in this area offer very little guidance. Compare *Boaz Spinning Company, Inc., supra,* with *Ripley Shoe Products Company, supra.* The reason for this absence of meaningful guidelines can be found in *Allied/Egry Business Systems, Inc., supra,* page 2, where the Board stated, "Realizing full well that in all cases such as this one, where one must attempt to fathom the meaning of another's words and assess the impress of such words on employees, reasonable men may differ, we differ with our colleague."

In that case, as in this, the employer did not say that the Union must strike to gain reasonable demands, but only that it had no intention of yielding to pressure by

the Union, such as strikes, where the object of such pressure was unreasonable. That employer did not state it would not bargain; nor did Respondent. In my judgment, a close examination of Respondent's literature discloses no express or implied promise of benefit or threat of reprisal. I consider aptly descriptive of the Respondent's literature in this case the following statement of the Board in *Howmet Corporation, supra,* page 3:

> Essentially the Employer's propaganda was a reminder that there can be disadvantages to union representation and that it would be wise for the employees to give heed to the disadvantages as well as the advantages in making their choice. And while the Employer did advert to strikes in this connection, we do not think that the content of the campaign material and the manner of its presentation was such as to indicate to employees that the Employer would not honor its statutory obligation to meet and bargain with the Union in good faith should the Union win the election. In the circumstances of this case, we are unable to say that the Employer so tainted the election atmosphere as to preclude the employees from exercising a free choice on the question presented to them at the election.

In line with the foregoing, I conclude that Respondent's literature neither violated Section 8(a)(1) of the Act, nor did it taint the election atmosphere as to preclude employees from exercising a free choice in the election. Accordingly, I shall recommend that paragraph 6(i) of the complaint, as amended, be dismissed.

C. *The Layoff-of-Robert Ray and Lee Miller*

Respondent manufactures and sells machine tools. In early 1970, it employed about 800 production and maintenance employees. On March 20, it laid off 26 employees, including Robert Ray and Lee Miller, both of whom were Union supporters.[8] General Counsel contends that the layoff of Ray and Miller was discriminatorily motivated and Respondent contends that it was motivated by economic necessity.

General Counsel's position respecting Respondent's assertion of economic necessity is somewhat equivocal. At times, it appeared that he was disputing the existence of any economic necessity for a layoff, and at other times he appeared to be conceding its existence. In any event, whatever the General Counsel's position, it is clear that in the period of the layoff Respondent was suffering an economic decline. Thus, whereas new orders had averaged approximately $2,620,000 per month during the fiscal year ending July 31, 1969, for the 7 month period from August 1969 through February 1970, the average monthly new orders placed had dropped to approximately $1,506,777, or a drop of

[8]Contrary to Respondent's contention, I conclude that the record supports a finding of company knowledge of Ray's and Miller's union activities. In my opinion, the record supports a finding that foremen Washabaugh and George knew of their union activities, and such knowledge is imputable to Respondent. It is true that Washabaugh and George testified that they did not convey their knowledge to plant manager Kissinger and that Kissinger testified that he had president Price made the decision to lay off employees and how many to lay off without consulting foremen. Be that as it may, it is not essential to General Counsel's proof that he establish by direct evidence that Kissinger knew of Ray's and Miller's union activities. It is sufficient that he show knowledge on part of a supervisor. Moreover, it is undisputed that Kissinger knew that the union organizational campaign was in progress, and he did not deny knowledge of Ray's and Miller's union activities. Cf. *Texas Aluminum Company, Inc. v. N.L.R.B.*, ... F. 2d ...., (C.A. 5) decided December 16, 1970.

over one million dollars per month from the previous twelve month average. At the beginning of its fiscal year in August 1969, Respondent had a backlog of orders in the amount of $23,000,000. This backlog decreased steadily to the point that it amounted to $18,000,000 in March, 1970.

On the basis of the foregoing, one must conclude that there was economic justification for a layoff. However, in a case where an employee is allegedly discharged for cause, it is a truism that proof of the existence of a cause for discharge does not preclude a finding that the discharge was motivated by union considerations. Similarly here, the fact of an economic decline does not preclude a finding that the layoff of March 26 was motivated by union considerations. Certain factors certainly suggest the possibility that the economic decline was seized upon as a pretext to coerce employees (as a group and irrespective of the union sympathies of the individuals selected for layoff) to refrain from supporting the Union. To begin with, there is evidence of a strong anti-union animus, including threats of plant closure. During the 7 month period which is relied upon by Respondent to show an economic decline, Respondent had hired approximately 50 employees, including 7 in January, 1970, 4 of whom were production and maintenance employees. In addition, Respondent had not laid off employees since 1957 or 1958, and at that time it had laid off 500 to 600 employees. In this instance, in laying off 26 employees, Respondent was reducing its work force by approximately 3¼ percent. The record does not indicate precisely how the figure of 26 was arrived at (except that the plant manager and president concluded after consultations with supervisors that that number could be

spared without hurting production) and one cannot help but marvel at the skill of a management that can determine its personnel needs with such precision. In light of such a stable employment history as Respondent has shown, one cannot help but ask why Respondent did not meet the economic decline by attrition, rather than a layoff, or a further reduction in hours (during this period, Respondent had reduced the hours of work from 50 hours per week to 45). In the circumstances, one must be forgiven the suspicion that in this instance Respondent used the economic decline as a pretext to coerce employees to refrain from supporting the Union.

Since General Counsel has not alleged that the layoff was motivated by union considerations, there is no need to dwell on this possibility. As the case stands, General Counsel must be taken as conceding that the layoff of March 26 was not only supported by economic necessity, but also was motivated by that necessity. What General Counsel contends, however, is that whatever economic necessity existed in the case of 24 of the 26 laid off employees, it did not exist as to Ray and Miller. While the matter is not free from doubt, I conclude that the evidence does not rise above the level of suspicion and that a finding of a violation would require the substitution of the Board's judgment for Respondent's business judgment.

General Counsel enumerates the following factors in support of a finding of a violation: (1) the "layoffs" occurred at the height of the Union's organizational activities; (2) at the time the "layoffs" were made, there was a substantial amount of work that had to be done; (3) employees were permanently transferred into Ray's department to perform his work; (4) a

supervisor in addition to other employees was called upon to work overtime to perform Miller's work; (5) a substantial number of employees, including all apprentices, some of whom had less seniority and experience than Ray and Miller, were retained; and (6) Respondent subsequently hired the same number of new apprentices as it had in the past, even though this was contrary to its admitted policy of employing apprentices on the basis of current and projected business conditions.[9]

As to (1), the timing of the layoffs has no significance other than the fact that it occurred during an organizational campaign, and it is explained by the evidence of an economic decline.

As to (2), (3) and (4), it is necessary to detail certain facts.

The layoff was made in accordance with seniority, the man with the least plant seniority being selected in those departments in which layoffs occurred. As a result, employees were retained in some departments who had less plant seniority than Ray and Miller. It is undisputed that Ray and Miller were the least senior employees in their departments,[10] Ray was one of two grind and dress men in the welding department, and

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[9]I am not setting forth separately the Union's arguments in support of a finding of a violation. Those arguments are not essentially different from those of General Counsel and while they are well presented they do not require separate discussion.

[10]Technically, one employee in the inspection department, F. A. Shank, was a junior to Miller. But Miller worked as an inspector in the welding department and Shank worked in another department and performed inspection work entirely different from that performed by Miller. In the circumstances, I can draw no inference of discriminatory motive from the fact Respondent laid off Miller, instead of Shank.

Miller was one of two inspectors in the welding department.

The record indicates that at the time of Ray's layoff, there were 16 bucks (skids or pallets) of work to be ground and dressed, and employee David Fair testified it took about 2 months to complete this work. At the time of the layoff, Ray was the only regular grind and dress man working, the other (Jim Fann) being absent from March 1 to April 6 due to illness. During this period, Ray was assisted by welders who were rotated to perform that work on a weekly basis. When Fann returned to work (making up for Ray's absence since his March 26 layoff) this practice of assigning welders continued, supplemented by an occasional apprentice, until James Weideman transferred to grind and dress on June 15. Thereafter, Fann and Weideman did the work, still with occasional assistance from welders and apprentices, until Fann quit in August. About a week later, Wayne Weaver was permanently transferred into grind and dress to replace Fann. Weideman and Weaver have been the two grind and dress men since that time.

It is seen from the foregoing that whatever Respondent's production and personnel needs may have been in other departments, there was need for the services of more than one grind and dress man. However, this does not mean that the layoff of Ray was discriminatorily motivated. Unitl Weideman transferred into the department on June 15, the work was performed within the department by employees with more seniority than Ray, and the very fact that welders could be taken from their regular jobs to do grind and dress work indicates a reduced need for employees in the welding department. As far as apprentices are concerned, it is

cutomary for apprentices to be assigned to production work as part of their training, and the record does not support a finding that there was any significant increase in such assignments. As to Weideman's transfer, it occurred several weeks after the layoff when it developed that work was slack in Weideman's department. Weideman had more seniority than Ray. Finally whatever Respondent's needs it has not hired any new employees (excepting apprentices) since the layoff, and it can be assumed that the reduction in the work force has been further aggravated by attrition.

In Miller's case, after his layoff the only remaining inspector in the welding department was Bloom who had more seniority than Miller. After Miller's layoff, Bloom continued as the only inspector in the welding department for about 6 weeks when he was transferred to other work. During that 6-week period, Bloom did both his own inspection work, plus that formerly performed by Miller, with the assistance, however, of other inspectors and assistance from his foreman. As to the foreman's assistance, it is clear that it was rendered because Bloom was unfamiliar with the inspection required on certain pieces. To the extent the foreman did production work, he did not do so regularly or continually. As to the assistance from other inspectors, the record indicates that about the time of Miller's layoff, Bloom was absent from work for 3 days because of illness, and inspection work was performed by first shift inspector Brake who worked 4 hours overtime (6:00 to 10:00 p.m.) and by second shift inspector Hat who would transfer from his regular job in the boring department from 10:30 p.m. to 2:30 a.m. After Bloom returned, he continued to receive assistance from both Brake and Hat, but not on any set routine,

nor both on the same day. As in Ray's case, the foregoing indicates some need for more than one inspector in the welding department, a need that could have been fulfilled by Miller's retention. It is clear, however, that there was insufficient work to occupy two inspectors on a full time basis and no new employees have been hired. A finding that Respondent should have retained Miller, who was the most senior of the 26 employees laid off, could only be supported by a substitution of the Board's judgment for that of Respondent as to its method of running its business. Respondent's decision to reach as deep as it did in laying off Miller strongly suggests an unlawful motive, but considering the record as a whole I cannot say that General Counsel has established a case by a preponderance of evidence.

I have not yet disposed of General Counsel's points (5) and (6) relative to apprentices. Little need be said in this regard other than that Respondent has an apprenticeship program of many years standing which is highly structured and formal. In my judgment, Respondent was fully justified in exempting the apprentices from the layoff, and no inference of unlawful motive may be drawn either from its failure to do so, or the fact that it began a new apprenticeship class after the layoff.

In accordance with the foregoing, I shall recommend that the allegations of the complaint respecting the layoff of Ray and Miller be dismissed.

IV. The Objections

As noted earlier, the Union filed objections to conduct affecting the results of the election. These were 7 in number, but objections numbered 1, 2, 3, 4, and 6 have been withdrawn. The remaining objections are as follows:

5. The employer held periodical meetings during the time of employment and did not deduct any wages for these meetings, which constituted an unfair labor practice in that they granted remuneration to the employees in order to influence their voting.

7. The employer distributed literature which was misleading, slanderous and beyond the right of free speech and free press, which was in violation of the law, and which constituted an unfair labor practice.

As to objection 5, it is undisputed that the meetings at which president Price spoke to the employees, as described earlier, were held on company time and that the employees were paid their regular wages for the time spent at the meetings. The Union contends that the payment of employees for attendance at these meetings, where there had never previously been any similar in-plant meetings, coupled with Respondent's expressed anti-union posture and unlawful conduct, constituted an economic inducement to the employees affecting the results of the election. In support of this contention, the Union relies on *U-Tell Corporation,* 150 NLRB 1534.

Whatever Price may have said in the employee meetings, and whatever other unfair labor practices Respondent committed are issues totally separate from Respondent's payment of wages to employees for time spent in attendance at meetings held to oppose the Union's attempt to obtain certification. In this objection, the Union in effect is seeking a finding that the holding of employee meetings on company time is grounds for setting aside an election. *Peerless Plywood Company,* 107 NLRB 427, clearly indicates otherwise

unless the meetings are held within 24 hours of the election, which was not the case here. Accordingly, I find no merit in Objection 5.

Objection 7 presents the same issue already considered as an unfair labor practice under Section 8 (a)(1) of the Act. The considerations that moved me to conclude that the literature did not violate Section 8(a)(1) of the Act persuade me that the literature constituted permissible campaign propaganda which did not interfere with the exercise of a free and uncoerced choice by the employees in the election of May 7.

Although I find no merit to Objections 5 and 7, the only specified objections remaining of the 7 originally filed, I shall nevertheless recommend that the election be set aside because of the acts of interference, restraint and coercion which I have found earlier in the discussion of Respondent's 8(a)(1) conduct. That the 8 (a)(1) conduct was to be considered as grounds for setting aside the election was set forth in the Regional Director's Supplemental Decision and Order Directing Hearing on Objections, in which the Regional Director noted that his investigation had disclosed testimony that supervisors had threatened employees with loss of employment if they supported the Union, created the impression of surveillance of union activities, interrogated employees and threatened employees with loss of benefits. These matters had not been specifically alleged in the objections, but the Regional Director correctly noted that his jurisdiction was not limited to the specific objections (citing *Carter-Lee Lumber Company*, 119 NLRB 1374) and the alleged 8(a)(1) conduct was included among the issues to be considered in determining whether or not the election should be set aside. On the basis of the findings of 8(a)(1) conduct

set forth earlier, I shall recommend that the election of May 7 be set aside and that a second election be directed.

V. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designated to effectuate the policies of the Act.

In accordance with the Regional Director's Supplemental Decision and Order Directing Hearing on Objections, I recommend that the Union's objections 5 and 7 be overruled, but by reason of the independent 8(a)-(1) conduct found herein I recommend that the election be set aside and that a new election be held at such time as the Regional Director deems appropriate.

Conclusions of Law

1. Landis Tool Company, Division of Litton Industries, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local Union No. 110, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union sympathies or desires and creating the impression of surveillance of their union activities, by threatening employees with plant closure, and by soliciting employee complaints and grievances, Respondent engaged in, and is engaged in, unfair labor practices within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act.

4. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act as alleged in paragraphs 6(g), (f), (h), and (i) of the complaint, as amended.

5. General Counsel has not established by a preponderance of evidence that the layoff of Robert Ray and Lee Miller was violative of Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER.[11]

Respondent, Landis Tool Company, Division of Litton Industries, its officers, agents, successors and assign, shall:

1. Cease and desist from:

(a) Soliciting employee complaints and grievances and impliedly promising them improvements in working conditions to induce them to withhold assistance

[11]In the event no exceptions are filed to this Recommended Order as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and Recommended Order herein shall, as provided by Section 10(c) of the Act and in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

and support to International Brotherhood of Teamsters and Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110, or any other labor organization.

(b) Threatening employees with plant closure if they select the above-named labor organization, or any other labor organization, as their exclusive representative for purposes of bargaining with regard to wages, hours, or other terms or conditions of employment.

(c) Creating the impression of surveillance of the union activities of employees by telling employees it knew they had signed union cards or referring to employees as union instigators.

(d) Interrogating employees about their union sympathies or desires in a manner constituting interference, restraint or coercion in violation of Section 8(a)-(1) of the Act.

(e) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the Act, or to refrain from any or all activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its Waynesboro, Pennsylvania plant, copies of the attached notice marked "Appendix."[12]

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[12]In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice

Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 6, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[13]

As to the allegations of the complaint found not to have been supported by the evidence, it is recommended that they be dismissed.

Dated at Washington, D. C.

/s/ Henry L. Jalette
Henry L. Jalette
Trial Examiner

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reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[13]In the event that this Recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify said Regional Director, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

Notice to Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

AFTER A TRIAL IN WHICH BOTH SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE.

The Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with those rights. More specifically,

WE WILL NOT question you about your union sentiments or desires.

WE WILL NOT create the impression we are watching you in your union activities by referring to employees as union instigators or telling employees we know about their union sympathies.

WE WILL NOT solicit your gripes and grievances and impliedly promise to improve working conditions to discourage you from selecting a union to represent you.

WE WILL NOT threaten to close the plant if you select International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110, or any other union, to represent you.

You are free to become and remain members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110, or any other labor organization.

LANDIS TOOL COMPANY
DIVISION OF LITTON INDUSTRIES
Employer

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty, Pittsburgh, Pennsylvania 15222 (Tel. No. 412-644-2977).

APPENDIX E.

Statutes Involved.

Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8-(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-194

LANDIS TOOL COMPANY, DIVISION OF LITTON INDUSTRIES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-8) is reported at 460 F.2d 23. The Board's decision and order (Pet. App. 9-45) are reported at 190 NLRB No. 140.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1972 (Pet. App. 1). The petition for a

writ of certiorari was filed on August 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Company interfered with its employees' right to organize, in violation of Section 8(a)(1) of the National Labor Relations Act, by implicitly promising, during a union campaign, that the Company would remedy employee grievances if the Union lost the scheduled election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 48.

STATEMENT

In early 1970, the Union[1] began organizing employees at the petitioner Company's plant in Waynesboro, Pennsylvania (A. 91-92, 64-65, 100).[2] During the election campaign which followed, Company president Ralph Price conducted three special meetings for employees (A. 13, 14, 116, 117). At one of these meetings, Price began by telling the employees that

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[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110.

[2] "A." references are to the Appendix filed in the court of appeals.

he wanted to have a question and answer session in order to give the employees an opportunity to state their problems, gripes, and complaints (A. 13, 110, 115, 125, 131, 140-142, 144). He expressed interest in hearing problems "that can't be settled through your foreman or your supervisors * * *" (A. 140). Price added that he could not make any promises (A. 13, 15, 140, 141, 116, 131), but that he would check into the employees' problems (A. 140). After the employees voiced their complaints, Price responded that, in view of the election campaign, "there wasn't much he could do at the moment, under the circumstances, but he would do what he could"; "his hands was [sic] still tied—until after the election was over" (A. 125, 131). He advised the employees that he did not think they needed a union to straighten out their problems and that everything could be worked out between management and the employees (A. 13, 15, 125, 131, 143, 140-141).[3]

On the above facts, the Board, adopting the findings of the Trial Examiner, held (Pet. App. 9-10, 15-17) that, in order to undermine the Union's campaign, the Company had solicited employees' grievances and by clear implication had promised to correct them, thereby restraining the employees in the exercise of their organizational rights in violation of Section 8(a)(1) of the National Labor

[3] Price immediately proceeded to deal with a complaint that there was a shortage of cutting torches in the welding department on the night shift. When the employee who complained came to work the following night, he found a cutting torch on his bench (A. 15 n. 4, 119).

Relations Act, 29 U.S.C. 158(a)(1).[4] The Board ordered the Company to cease and desist from the unlawful conduct and to post appropriate notices; the contested election was set aside and a new one was ordered (Pet. App. 10, 43-45).

The court of appeals enforced the Board's order. It held that there was substantial evidence in the record to support the finding by the Examiner and the Board that implied promises were made to the employees that "their grievances would be remedied if the Union was defeated" (Pet. App. 3-5). This finding, the court noted (Pet. App. 5), "does not depend upon the operation of a per se rule"; it specifically rejected the application of "a per se rule that any solicitation of grievances in a preelection context will always be held to imply unlawful promises" (*ibid.*).

ARGUMENT

Although petitioner has attempted to formulate the issue somewhat differently in this Court, the essential question presented in this case is, as petitioner stated in his brief on appeal, "[w]hether there is substantial evidence on the record as a whole to support the conclusion the Company, by its President, Ralph Price, violated Section 8(a)(1) of the Act by

[4] The Board also found that the Company had violated Section 8(a)(1) by coercive interrogation, threats of job loss, and by suggestions that union activity was under surveillance (Pet. App. 19-24, 25-28). The court of appeals sustained these findings (Pet. App. 5-8), and the Company does not challenge them here.

conducting 'question and answer' sessions with employees during a union election campaign" (C.A. Br., p. 1). Despite the premise of the petition, the Examiner did not rely on a *per se* rule about preelection conversations between management and employees.[5] The Examiner, the Board, and the court below, all decided that on *this* record the Company's preelection conduct constituted the making of implied promises unfairly designed to undercut the organization campaign. Such an essentially factual determination does not warrant plenary review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

Unlike the cases that petitioner suggests are in conflict, the evidence here plainly shows that employees' grievances were solicited by the Company during the election campaign and that the employees were then repeatedly informed their grievances could be worked out with management without union intervention, that a union was "not need[ed] * * * to straighten out their problems" (Pet. App. 17).[6] The

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[5] In view of the court's holding that the Examiner's finding did not depend on the operation of a *per se* rule, the second question stated in the petition (Pet. 2)—whether appellate counsel can substitute his opinion for that of the Board by conceding that language "crucial to the holding of the case" is dictum only—is not presented on the record in this case.

[6] Reliance on *Fairchild Camera and Instrument Corporation* v. *National Labor Relations Board*, 404 F. 2d 581, 585 (C.A. 8), is misplaced. There, the court determined on the particular facts presented that the employer statements contained "no promises, no threats, and no coercion." Similarly, *National Labor Relations Board* v. *M. H. Brown Company*, 441 F. 2d

remarks in this case had the effect of undermining the Union's campaign efforts by implying that the Company would itself remedy the grievances. Promises of this sort during election campaigns are forbidden by Section 8(a)(1).[7] The promises are no more permissible because made by clear implication rather than expressly. As the court of appeals stated (Pet. App. 4-5):

> The conclusion that implied promises were made in a preelection context is supported by substantial evidence. The testimony suggests that the employees understood their grievances would be remedied if the Union was defeated. Such conduct was an interference with rights of employees guaranteed by Section 7 of the Act, 29 U.S.C. § 157, and [the Company] thereby violated Section 8(a)(1) * * *.

839, 842-843 (C.A. 2), is inapposite. The alleged "promise" of higher wages in that case, it turned out, had been decided upon by the employer before the union began its election campaign, and had been based on valid busines reasons.

[7] Section 8(c) of the Act, relied on by the Company (Pet. 9), precludes reliance on the expression of views, arguments, or opinions in finding unfair labor practices only when they do not contain a "promise of benefit" or "threat of reprisal." Because of the determination that promises of benefit were involved, Section 8(c) is inapplicable to this case.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

JOHN H. FERGUSON,
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National Labor Relations Board.

SEPTEMBER 1972.

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